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## THE MABO CASE AND THE NATIVE TITLE ACT

This article has been contributed by the Native Title Section of the Department of Prime Minister and Cabinet.

### RECOGNITION OF NATIVE TITLE

In May 1982, Eddie Mabo and four other Meriam people of the Murray Islands in the Torres Strait began action in the High Court of Australia seeking confirmation of their traditional land rights. They claimed that Murray Island (Mer) and surrounding islands and reefs had been continuously inhabited and exclusively possessed by the Meriam people who lived in permanent communities with their own social and political organisation. They conceded that the British Crown in the form of the colony of Queensland became sovereign of the islands when they were annexed in 1879. Nevertheless they claimed continued enjoyment of their land rights and that these had not been validly extinguished by the sovereign. They sought recognition of these continuing rights from the Australian legal system. The case was heard over ten years through both the High Court and the Queensland Supreme Court. During this time, three of the plaintiffs including Eddie Mabo died.

On 3 June 1992, the High Court by a majority of six to one upheld the claim and ruled that the lands of this continent were not terra nullius or land belonging to no-one when European settlement occurred, and that the Meriam people were 'entitled as against the whole world to possession, occupation, use and enjoyment of (most of) the lands of the Murray Islands.'

The decision struck down the doctrine that Australia was terra nullius - a land belonging to no-one. The High Court judgment found that native title rights survived settlement, though subject to the sovereignty of the Crown. The judgment contained statements to the effect that it could not perpetuate a view of the common law which is unjust, does not respect all Australians as equal before the law, is out of step with international human rights norms, and is inconsistent with historical reality. The High Court recognised the fact that Aboriginal people had lived in Australia for thousands of years and enjoyed rights to their land according to their own laws and customs. They had been dispossessed of their lands piece by piece as the colony grew and that very dispossession underwrote the development of Australia into a nation.

The Native Title Act 1993 is part of the Commonwealth Government's response to that historic High Court decision.

### The Native Title Act

The Prime Minister said in December 1993 during the passage of the Native Title Bill through Parliament:

'... as a nation, we take a major step towards a new and better relationship between Aboriginal and non-Aboriginal Australians. We give the indigenous people of Australia, at last, the standing they are owed as the original occupants of this continent, the standing they are owed as seminal contributors to our national life and culture: as workers, soldiers, explorers, artists, sportsmen and women - as a defining element in the character of this nation - and the standing they are owed as victims of grave injustices, as people who have survived the loss of their land and the shattering of their culture.'

The Government was simultaneously presented with an opportunity and a challenge. The opportunity was to improve the relationship between Aboriginal and non-Aboriginal Australians, and recognise their basic property rights. The challenge was how to respond to the land management issues because these property rights were recognised.

The Prime Minister said also during the passage of the legislation through Parliament that the Government made its twin objectives clear in its response to Mabo: to do justice to the High Court decision in protecting native title, and to ensure workable, certain land management.

The Act does five things:

- It recognises and protects native title.
- It provides for the validation of any past grants of land that may otherwise have been invalid because of the existence of native title.
- It provides a regime to enable future dealings in native title lands and imposes conditions on those dealings.
- It establishes a regime to ascertain where native title exists, who holds it and what it is, and to determine compensation for acts affecting it.
- It creates a land acquisition fund to meet the needs of dispossessed Aboriginal and Torres Strait Islander peoples who would not be able to claim native title.

In the Act, the Commonwealth has adopted the common law definition of native title. Native title is defined as the rights and interests that are possessed under the traditional laws and customs of Aboriginal and Torres Strait Islander peoples, and that are recognised by common law. Native title will be subject to the general laws of Australia, including State and Territory laws that are consistent with the Act, although native title rights to hunt, fish and carry on other activities may be exercised without the need for a licence or permit where others can carry out the activity only with a licence or permit.

The legislation represents a point of balance that recognises everyone's interests: Aboriginal and Torres Strait Islander peoples who need their property rights and cultural rights recognised and respected; land developers - miners, pastoralists, tourist operators and others - who need access to land and certainty of title; and State and Territory Governments that need to manage land resources.

The Native Title Act came into operation on 1 January 1994. From that time no action may validly be taken in relation to land that is subject to native title except in accordance with the Act. Where land has been subject to certain types of tenure such as freehold, any native title to that land has

been extinguished. In such cases, any action in relation to that land, such as the processing of mining applications, may proceed. However, if it is not clear from the tenure history that native title would have been extinguished on the land in question, for example, on vacant Crown land, then the proposed dealings in land would have to proceed with due regard for native title under the Act.

## The National Native Title Tribunal

The Act provides for a systematic legal framework to deal with matters affecting native title. The new National Native Title Tribunal has the power to determine uncontested native title and compensation claims and will handle other issues including assisting negotiations and making decisions on proposed grants. The Act gives jurisdiction to the Federal Court to determine contested claims. The Tribunal is based in Perth and there are registries in all capital cities. The Tribunal is headed by Justice Robert French, whose appointment as President commenced on 2 May 1994 for three years. Among other things in a distinguished career, Justice French helped found, and later became Chairman of, the Aboriginal Legal Service in Western Australia.

The procedures of the Tribunal and those of the Federal Court are designed to be fair, just, economical and prompt. Those procedures must take account of the cultural and customary concerns of Aboriginal and Torres Strait Islander peoples, and are not bound by legal forms or rules of evidence. This ensures that there will be sensitivity to traditional laws and customs. At the same time, there are safeguards against frivolous and vexatious claims, which will be rejected, and applications must contain sufficient information about the claims and must specify the area covered.

The Native Title Act provides an innovative and accessible approach to settle native title claims. For example, the Act confirms the potential to settle difficult cases by negotiation and further recognises that agreements might be reached on a regional basis.

The Act also sets out criteria to be satisfied in order to ensure that there is a nationally consistent approach to the recognition of native title so that State and Territory tribunals and processes can be recognised in order to fulfil the functions of the National Tribunal.

## Role of the States and Territories

The Act is designed to allow a cooperative regime between the Commonwealth and the States and Territories by enabling their own bodies to be set up to determine native title, compensation claims and whether future dealings in native land can be done. States and Territories can choose, however, to use the Commonwealth regime. States and Territories can enact complementary validating legislation and develop other appropriate processes. At the time of writing there had been some clear developments in this area. Most States and Territories have enacted or introduced legislation intended to validate their past acts. The legislation of several States also makes provision for arrangements to determine whether future dealings in native title land can take place.

Where such State or Territory legislation exists and has been recognised, Aboriginal and Torres Strait Islander peoples will have a choice as to whether they seek determinations of native title and compensation through the Commonwealth or State or Territory systems. Determinations on whether certain grants over native title land can proceed would be made under the State or Territory law.

## Compensation

Native title holders are entitled to compensation for the effect of the validation of past acts on their rights. That compensation is payable by the Government that made the past act.

If a future act extinguishes or impairs native title, the native title holders will be entitled to compensation on essentially the same basis as someone who holds a freehold title (or leasehold in the Australian Capital Territory or Jervis Bay Territory), according to the relevant compensation laws.

The National Native Title Tribunal can deal with uncontested claims for compensation and will seek to mediate contested claims. If mediation is unsuccessful, the matter will be referred to the Federal Court.

The Commonwealth has offered to pay the majority of certain costs: three-quarters of the cost of past acts, and, until 1998, half of the continuing costs for State/Territory recognised bodies and alternative provisions to the Commonwealth regime.

**Non-claimant Applications**

Anybody with an interest in land - for example, holders of certain types of lease or an exploration permit - and all governments may wish to know whether native title exists in relation to that land, or whether a claim has been made for a determination about native title. If it cannot be readily established that native title has been extinguished, application can be made to the Tribunal for a determination. These applications are called non-claimant applications, to distinguish them from claims for native title from Aboriginal and Torres Strait Islander peoples who believe they may have native title rights.

If no claim is made within two months of the non-claimant application being publicly advertised, the government in question can issue the lease. Even if native title is later found to have existed, the lease remains valid and any compensation would be payable by the government. Through the non-claimant process, the Act sets up a system where future acts can take place with certainty and the process takes place in a defined time frame.

**Compulsory Acquisition Procedures**

Normal government compulsory acquisition procedures, including a right to compensation, can apply to native title land. This means that governments may acquire land from native title holders, just as from other land holders, for public purposes such as infrastructure.

**Surrender of Native Title**

The legislation further recognises that native title holders may choose to surrender native title on terms acceptable to them, for example, to exchange it for a statutory title to allow them to engage in tourism or other commercial ventures.

The Land Acquisition Fund

Native title has been widely extinguished by past acts of government, such as the granting of freehold and leasehold title. Many Aboriginal and Torres Strait Islander peoples now live away from their traditional lands and could find it impossible to demonstrate a connection with those lands. In recognition of the fact that many Aboriginal and Torres Strait Islander peoples will not be

able to gain native title because of historic dispossession, the Commonwealth Government also established a land acquisition fund under the Act. The fund allows Aboriginal and Torres Strait Islander peoples to acquire and manage land in a way that provides economic, environmental, social or cultural benefits to them.

In the 1994-95 Budget the Commonwealth Government announced that a total of $1,463 million is to be allocated to the fund over ten years. These allocations will be invested so as to accumulate a self-sustaining fund for land acquisition and management.

**The Act and Mining**

There is no provision in the Act for native title holders to veto mining on their land. The Act does, however, provide them with the right to negotiate under certain circumstances. Those circumstances include the compulsory acquisition by governments of native title where it is not for a direct public purpose (for example, building a school or road) but for the purpose of granting the land to a third party such as a property developer; and the creation of a right to mine. In a lot of cases the outcome will most likely be decided between the developer and the relevant Aboriginal or Torres Strait Islander community. Where agreement cannot be reached, the Act provides for an arbitrated determination by the Tribunal and, potentially, a ministerial decision, which overrides the Tribunal's determination. The Act sets out fair and finite time periods for this process.

The Act also allows certain future activities that will have minimal effect on native title to be excluded from the arrangements which give rights to negotiate to native title holders. This will be of special relevance and value to mineral exploration.

State and Territory mining laws that deal with other aspects of the mining regime are unaffected by the Native Title Act. The Act ensures that legislative regimes for economic activities offshore, especially commercial fisheries, and petroleum extraction can be validated.

Mining leases will not extinguish native title, which can be exercised after the grant and any renewals have expired. Future mining grants will not extinguish native title. This provision is in line with existing State practices with respect to mining grants over freehold land. Mining leases may be renewed on the same terms as before.

**Pastoral Leases**

The Act makes provision for Aboriginal people who own or acquire a pastoral lease to choose to claim native title rights where it is determined that the owners would otherwise meet native title criteria apart from the existence of the lease. The pastoral lease would not be given up. Existing covenants and conditions in the lease will continue to apply and prevail over native rights. Valid pastoral leases can be renewed even if native title has survived the lease and the use of the land. For pastoral leases generally, the Act ensures that the existing rights of pastoral lease holders are protected: should any invalidity be found because of native title, the lease will be validated.

**The Way Ahead**

The Native Title Act 1993 and the High Court decision that preceded it are only part of the reconciliation process taking place between indigenous and other Australians. For example, Australia is seeing historic accords between Aboriginal peoples and mining companies that show the way to a new working relationship. Working with the Native Title Act means working with

Aboriginal and Torres Strait Islander peoples towards a better social and economic future, within a framework of national equity and fairness for all Australians.

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